

Letter of Findings: 04-20130157
Gross Retail Tax
For the Years 2009, 2010, and 2011

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ISSUES

I. Gasoline Sales – Gross Retail Tax.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that the Department of Revenue's audit overstated the amount of gasoline sold at its convenience store.

II. Business Expenses – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-5-4; IC § 6-8.1-5-4(c).

Taxpayer maintains that the Department of Revenue's mischaracterized some of its vendor transactions as taxable purchases.

III. Inventory – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c).

Taxpayer states that the Department of Revenue's audit overstated the amount of sales tax it should have collected from its customers because some of the costs assessed by the audit reflected items which remained as unsold inventory at the time the audit was concluded.

STATEMENT OF FACTS

Taxpayer is an Indiana business which operates a combination gasoline station and convenience store. The gasoline station sells gasoline but does not sell diesel fuel. The convenience store sells, tobacco products, soft drinks, food items, and general merchandise.

The Department of Revenue ("Department") conducted an audit review of Taxpayer's books and records. The audit began June 2012 and concluded January 2013. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gasoline Sales – Gross Retail Tax.

SUMMARY

Taxpayer purchased gasoline which it eventually sold to its retail customers. The audit found that Taxpayer "underreported the gallons of fuel sold" compared to the amount of gasoline Taxpayer purchased from its vendor. The audit report noted that the underreporting:

[I]s a significant accumulation and has not been shown due to spill, contamination, a theft, or other documented reason. These amounts are greater than the underground tank capacity.

The audit found that Taxpayer understated the amount of gasoline sold at its store by approximately 231,000 gallons. The audit proposed additional sales tax based on the differences between the amount purchased and the amount reported on the pump.

Taxpayer disagrees stating that perhaps the Department's auditor "added some invoices twice or missed some but we are [now] giving the correct totals for purchases...."

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A retail merchant – such as Taxpayer – is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes...." IC § 6-2.5-9-3.

Taxpayer provided various invoices from its gasoline vendor but provides only a sketchy explanation of why these invoices are relevant to determining the amount of gasoline it actually sold. Presumably, the invoices are intended to demonstrate that Taxpayer did not underreport the amount of gasoline it sold.

Taxpayer has not met its burden under IC § 6-8.1-5-1(c) of establishing that the sales tax assessment

attributable to gasoline sales is wrong. The administrative hearing is not the appropriate venue in which to conduct a detailed reexamination of the field work performed at the time the audit was conducted or to reexamine the newly supplied invoices outside the context of Taxpayer's other business records. To do so would be entirely presumptuous on the part of the Hearing Officer.

Nonetheless, the Audit Division is requested to review the gasoline invoices, determine what – if any – significance should be attached to these invoices, and to make whatever adjustment to the sales tax assessment as may be warranted.

FINDING

Taxpayer's protest is respectfully denied.

II. Business Expenses – Gross Retail Tax.

DISCUSSION

The audit found that Taxpayer had underreported the "cost of goods sold." For example, Taxpayer's check register "showed high amount spent on merchandise purchases than the [T]axpayer's financial statements cost of goods sold."

The audit was unable to reconcile the issue because Taxpayer was unable to provide either sales or purchase invoices. Using a "summarized list of 2010 merchandise purchases," the audit estimated the amount of additional sales tax owed by Taxpayer.

Taxpayer disagrees stating that "some of the vendors that have been added as [cost of goods sold] are not goods for resale but belong in other expense categories." Taxpayer asks that the Department review the audit findings and issue a revised – but unspecified – assessment.

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." IC § 6-8.1-5-4. In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

Taxpayer has provided various documents, lists, check stubs, and the like. With one exception, Taxpayer fails to explain with any specificity the significance of these documents or to explain how or to what extent the documents affect the proposed assessment.

Taxpayer has provided a signed, executed copy of the lease for its "convenience store/Gas station." The lease calls for \$4,000 per month lease payments. Accompanying the lease, are check stubs which purport to represent the \$4,000 monthly payments. Taxpayer asks that the amounts be removed from the audit's cost of goods sold and that the sales tax assessment be adjusted accordingly.

As pointed out in Part I above, IC § 6-8.1-5-1(c) places the burden on the Taxpayer of establishing that the challenged tax assessment is "wrong." The lease and the check stubs raise the possibility that the audit's "cost of goods sold" tally was incorrect. The Department is unable to agree that Taxpayer has met its burden of demonstrating that the assessment was wrong. However, the Audit Division is requested to review the evidence provided by Taxpayer and determine whether or not the purported lease payments should be removed from what Taxpayer describes as the "cost of goods sold."

FINDING

Taxpayer's protest is sustained in part subject to audit review.

III. Inventory – Gross Retail Tax.

DISCUSSION

Taxpayer makes a secondary argument related to the audit's assessment of sales tax based on the "cost of goods sold." Taxpayer argues that some of the "goods" were never sold but remained in inventory at the time the audit was conducted. Taxpayer concludes that it should not be required to pay tax on items which remained unsold at the time the audit concluded January 2013.

As Taxpayer explains:

Not all the purchases have been sold. There has been [a] substantial increase in inventory [and] we have inventory reports for the two periods, hopefully this might reduce the assessment of [cost of goods sold].

Taxpayer's argument is speculative because Taxpayer has provided no documentation upon which to revise the assessment. As noted previously, IC § 6-8.1-5-1(c) requires that the Taxpayer demonstrate that the assessment is "wrong."

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

In all substantive respects, Taxpayer's protest is denied; however, the Audit Division is requested to review the gasoline vendor invoices and purported lease payments and determine whether the assessment should be revised based on that review.